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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MARTIN SCHWIMMER,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States may compel a defendant whose federal conviction is on appeal to testify before the grand jury, under a grant of immunity pursuant to 18 U.S.C. §§6002-03, without violating the defendant's Fifth Amendment right to due process and Sixth Amendment right to the effective assistance of counsel.

2. Whether the United States may compel a defendant whose federal conviction is on appeal to testify before the grand jury, under a grant of immunity pursuant to 18 U.S.C §§6002-03, without violating the defendant's Fifth Amendment right to remain silent and his privilege against self-incrimination.

3. Whether the federal prosecutor's interrogation of the defendant before the grand jury outside his counsel's presence

violates the ethical rules against communication with a party known to be represented without the consent of his attorney.

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## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULESINVOLVED

**U.S. Const. amend. V:**

> ...nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law...

**U.S. Const. amend. VI:**

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

**28 U.S.C. § 1826 provides:**

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of --

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

**18 U.S.C. §6002:**

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to --

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-

incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

**18 U.S.C. § 6003:**

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment....

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

**D.R. 7-104 of The American Bar Association's Code of Professional Responsibility, in pertinent part:**

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

## OPINIONS BELOW

The opinion of the district court was rendered orally; that ruling is reproduced in the appendix at A-19.

The decision of the Court of Appeals for the Second Circuit is reported at 882 F.2d 22 (2d Cir. 1989), and is reproduced in the appendix at A-1.

## JURISDICTION OF THE COURT

The judgment of the Court of Appeals is dated August 1, 1989. (A-17) On September 14, 1989, the Court of Appeals denied rehearing and rehearing en banc. (A-19) This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. 1254(1).

## INTRODUCTION

This case presents an important question of first impression: whether a federal defendant whose conviction is pending appeal may be called to testify before a grand jury and, upon a grant of immunity pursuant to 18 U.S.C. §§6002-03, compelled to answer questions about the subject matter of his trial and conviction. The Court of Appeals for the Second Circuit ruled that this procedure did not violate the defendant's due process rights, his Fifth Amendment privilege against self-incrimination or his Sixth Amendment right to counsel.[1] This ruling cannot be reconciled with settled Fifth and Sixth Amendment principles.

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[1]The Court also ruled that the prosecutor could question Petitioner before the grand jury without violating Disciplinary Rule 7-104(A)(1) of the American Bar Association's Code of Professional Responsibility.

More important, perhaps, the reasoning of the Court of Appeals compels a more troubling conclusion: the government need not even wait until it obtains a conviction to call an indicted defendant before the grand jury and force him to testify, without counsel, about his alleged crimes. According to the Court of Appeals, as long as his compelled testimony is immunized, he has no legitimate cause to complain.

For the reasons which follow, Petitioner submits that the decisions of this Court foreclose this result. Moreover, the Court of Appeals' decision is a dramatic departure from generally accepted notions about the operation of the American system of criminal justice.

## STATEMENT OF THE CASE

On June 16, 1987, Petitioner Martin Schwimmer was indicted by the grand jury for the Eastern District of New York. He was

charged, inter alia, with knowingly receiving fees or kickbacks for the investment of funds of employee benefit plans, in violation of federal law. The government believed that, in addition to receiving illegal fees himself, Petitioner made illegal payments to unknown union officials. These illegal kickbacks were alleged as part of a RICO count, but not as separate, substantive crimes.

Petitioner entered a plea of not guilty, denying that he had received, or made, any illegal payments. Following a jury trial at which he elected not to testify, he was convicted of illegal receipt of fees, certain tax offenses, and violating the RICO act. He was sentenced on February 14, 1989, and promptly filed a notice of appeal. His appeal from the conviction was argued before the Court of Appeals for the Second Circuit on

August 18, 1989, and is presently pending before that Court. He was granted bail pending the appeal.

Immediately after sentence was pronounced, in a highly unusual step which is now sure to become a standard part of the prosecutor's arsenal, Petitioner was served with a subpoena commanding him to appear before the grand jury.

According to the prosecutor, the grand jury which issued the subpoena differs from the one that indicted Petitioner. However, the investigation concerns the same subject matter as Petitioner's trial. Specifically, the new grand jury is seeking information about the suspected illegal payments to union officials. Indeed, the Strike Force Attorney who was handling the grand jury matter was the same attorney who prosecuted Schwimmer.

In discussions concerning the subpoena, the prosecutor represented to Petitioner's counsel that, if Petitioner were to testify in the grand jury consistent with his plea of not guilty -- that is, if he were to deny receiving illegal fees and making payoffs to union officials -- the prosecutor would seek an indictment against him for perjury.

On the adjourned return date of the subpoena, Petitioner declined to testify, invoking his Fifth and Sixth Amendment rights. He also asserted that it is ethically improper for the prosecutor to question him before the grand jury without the presence of his attorney in light of the pending indictment and the pendency of the appeal from his conviction. Petitioner was then given an order, signed by a United States District

Judge, granting him immunity, pursuant to 18 U.S.C. §§ 6002-03. Petitioner persisted in his refusal to testify.

Petitioner moved to quash the subpoena; the government moved for an order of contempt and confinement, pursuant to 28 U.S.C. § 1826. The matter was set before the Honorable Joseph M. McLaughlin, the district judge who had presided at Petitioner's trial.

At the hearing, Petitioner reasserted his Fifth and Sixth Amendment rights and argued that the prosecutor's conduct was ethically improper. In an oral ruling from the bench, Judge McLaughlin rejected Petitioner's claims. He concluded that Petitioner's Fifth Amendment right against self-incrimination was defeated by the immunity order.[2] (A-22) He also ruled that the Sixth Amendment guaranteed Schwimmer

[2]He did not address Petitioner's ethics claim but implicitly rejected it.

nothing more than the right to have counsel outside the grand jury room, a right which the government had not infringed. (A-22,23)

According to Judge McLaughlin, the pending appeal was inconsequential to the issue at hand. In his view, there would be no interference with the effective assistance of counsel because nothing Petitioner said before the grand jury could be used against him either in the pending appeal, or at any future retrial. (A-23)

Judge McLaughlin found Petitioner in contempt, and summarily ordered him confined. However, he granted Petitioner bail pending the determination of an expedited appeal from the order of contempt. (A-25)

Petitioner took an expedited appeal to the Second Circuit. At oral argument in that Court, the government conceded that, for Fifth and Sixth Amendment purposes, it made no

difference that Petitioner had already been tried and convicted. According to the government, there was nothing to stop it from compelling any person -- before or after indictment, before or after trial -- to testify before the grand jury. The panel seemed troubled by the startling implications of the government's argument, as well as its implicit trivialization of the appellate stage of the proceedings.

Nevertheless, by decision dated August 1, 1989, the Court of Appeals affirmed the district court's finding of contempt and its order of confinement. (A-1) Like the district court, it ruled that Petitioner's Fifth Amendment claim was defeated by the grant of immunity. According to the panel the transcript of the first trial would furnish a record against which to compare the government's proof at the second trial, and

thus could assure that the government did not use the compelled testimony against him at re-trial. (A-8) The Court agreed with Petitioner that non-evidentiary uses of the testimony would violate his rights -- for example, the government's use of his testimony to focus additional investigation, or to fashion cross-examination or otherwise map a strategy for retrial. The panel suggested that the government could guard against non-evidentiary uses of the compelled testimony by establishing a "Chinese Wall." (A-9,10)

The panel, however, did not address Petitoner's claim that there could be no guarantee that the government would not use the compelled testimony invidiously against him on the appeal, and no way to ascertain whether or not it had done so.

The panel also rejected Petitioner's Sixth Amendment claim. The Court of Appeals agreed that Petitioner's Sixth Amendment right to assistance of counsel attached with the return of the indictment and continued during the pendency of his appeal. (A-10,11) But the Court agreed with the district court that the right to counsel did not include the right not to be interrogated by the prosecutor without the presence of his counsel within the grand jury room. (A-12)

The Court also rejected Petitioner's Sixth Amendment claim that his answers to the grand jury's questions could interfere with his right to counsel by foreclosing certain arguments and strategies his counsel might otherwise pursue. The Court ruled that defense counsel were not entitled to remain ignorant of their client's guilt or innocence and would not be foreclosed from making

sufficiency arguments even for a client known to be guilty. (A-12,13) It did not, however, address Petitioner's specific claim under Nix v. Whiteside, 457 U.S. 157 (1986): to wit, if Petitioner inculpated himself before the grand jury, counsel would be ethically foreclosed from asserting Petitioner's innocence -- a not irrelevant matter either on appeal or at a retrial.

Finally, the Court of Appeals rejected Petitioner's contention that the prosecutor's questioning of him before the grand jury would violate Disciplinary Rule 7-104(A)(1) of the American Bar Association's Code of Professional Responsibility. It ruled that the questioning of a represented defendant before the grand jury without the consent and outside the presence of his counsel was "authorized by law" and thus did not violate the disciplinary rule. (A-14,15)

Rehearing and rehearing en banc were denied by order dated September 14, 1989. (A-19)

## SUMMARY OF ARGUMENT

The Court of Appeals has held that the prosecutor may properly subpoena an indicted defendant to appear before the grand jury and that the court may compel him to testify, under penalty of contempt, about the very charges on which he stands indicted. According to the Second Circuit, as long as the defendant is granted immunity from use and derivative use of the compelled testimony in subsequent criminal proceedings, and as long as the defendant is permitted to confer with counsel outside the grand jury room, the defendant's rights -- including his Fifth Amendment right against self-incrimination and his Sixth Amendment right to the assistance of counsel -- are not infringed.

In this case, the subpoenaed defendant had pled not guilty, declined to testify at his trial, and had already been tried and convicted of the crimes charged in the indictment. An appeal from that conviction is, and remains, pending.

But the reasoning of the Court of Appeals compels the conclusion that the government need not even have waited until after trial and conviction to haul the defendant before the grand jury and force him to testify about the facts underlying his indictment. If the Court of Appeals is right, then the government is free to indict a defendant, and subpoena him to testify before the grand jury at any time before, during, or after his trial -- and prosecutors will have every incentive to do so.

This procedure, which now bears the imprimatur of the Second Circuit, represents a startling break in tradition and a sea change in the relationship between the government and the accused. Its full ramifications can scarcely be imagined.

Petitioner contends that this novel procedure runs afoul of several basic Constitutional principles long recognized by this Court. In addition, it conflicts with a ruling of the Court of Appeals for the Sixth Circuit, sitting en banc. For these reasons, the writ of certiorari should be granted and the correctness of the Second Circuit's ruling should be considered by this Court.

## ARGUMENT

### AN INDICTED DEFENDANT -- INCLUDING ONE WHOSE CONVICTION IS ON APPEAL -- DOES NOT OWE THE GRAND JURY HIS TESTIMONY, AND CANNOT BE COMPELLED TO GIVE IT

It is generally true that all persons have an obligation to give testimony before the grand jury when properly summoned. The rule, however, is "not without exception." The duty, "so onerous at times, yet so necessary to the administration of justice ... is subject to mitigation in exceptional circumstances." Blair v. United States, 250 U.S. 273 (1919). See also Kastigar v. United States, 406 U.S. 444, 443 (1972). The grand jury's subpoena power, like other powers it possesses, is broad, but not unlimited. United States v. Calandra, 414 U.S. 338, 346 (1974).

Until this case, it has always been assumed that once a person has been indicted, he becomes an "exceptional" case. See, e.g., Kirby v. Illinois, 406 U.S. 682, 688-89 (1972)). Whether by reason of the Fifth Amendment's self-incrimination or due process clauses, or the Sixth Amendment's guarantee of effective assistance of counsel, once the government has indicted, the defendant may invoke his right to remain silent. It has seemed beyond question that, from that point on, the government could not force him to answer questions about the charges, nor interrogate him secretly without the presence of his attorney.

Through narrow, formalistic, and incorrect analysis of the precedents of this Court, the Court of Appeals has profoundly altered the fundamental rules of the game.

A. The Sixth Amendment And The Due Process Clause of the Fifth Amendment

The Sixth Amendment guarantees the accused the effective assistance of counsel. Evitts v. Lucey, 469 U.S. 387, 395 (1985); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); Powell v. Alabama, 287 U.S. 45 (1932). Forcing Petitioner to testify before the grand jury while he is under indictment and his appeal is pending violates this Sixth Amendment right. Cf. United States v. Wade, 388 U.S. 218 (1967); Massiah v. United States, 377 U.S. 201 (1964).

A grand jury witness -- even one who is a "target" of the investigation or a "putative" defendant -- has no Sixth Amendment right to counsel in the grand jury room. Under Sixth Amendment jurisprudence, however, this Court has suggested, but never held, that an indicted defendant stands in a markedly different position.[3] In United States v.

[3]Petitioner's Sixth Amendment rights attached (footnote continued)

Mandujano, 425 U.S. 564 (1976), Chief Justice Burger expressly recognized the distinction between an indicted defendant and a person not under indictment in the grand jury context. Acknowledging the rule that a grand jury witness has no Sixth Amendment right to counsel in the grand jury room, Chief Justice Burger contrasted that situation with that where the witness is under indictment. After

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(footnote continued from previous page) when the indictment was returned against him. Michigan v. Jackson, 475 U.S. 625 (1986); United States v. Gouveia, 467 U.S. 180, 188 (1984). Indeed, the courts below recognized that this was so.

Those courts however failed to recognize that, when adversarial proceedings commenced against him with the indictment's return, Petitioner's relationship with the government underwent critical change. With the initiation of formal charges, the Sixth Amendment guaranteed Petitioner "the right to rely on counsel as a 'medium' between him and the State." Maine v. Moulton, 474 U.S. 159, 176 (1985). Consequently, from the time of his indictment forward, the government was foreclosed from questioning him either before the grand jury or elsewhere without his consent or outside his lawyer's presence.

stating that a grand jury witness, even one who is a target of the investigation, has the right to assistance of counsel, but not in the grand jury room, Chief Justice Burger aptly noted:

> That statement [is] plainly a correct recital of the law. No criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play.

Id. at 581 (emphasis added).

The clear and necessary corollary is that the grand jury witness who has been indicted can invoke the Sixth Amendment's protection. From the time of his indictment, he is entitled to rely on counsel as a medium between him and the prosecuting authority. See Maine v. Moulton, 474 U.S. 159, 176 (1985). That the defendant has been tried and convicted leaves undiminished the rationale for Chief Justice Burger's distinction if the

conviction is the subject of a pending appeal. This is so because the effective assistance of counsel protected by the Sixth Amendment stretches from indictment to the conclusion of the case, which encompasses all viable direct appeals. See Evitts v. Lucey, 469 U.S. 387, 404-05 (1985); Anders v. California, 386 U.S. 738, 744 (1967).

Two lines of cases forming the pillars of the Sixth Amendment's guarantee of effective assistance of counsel show why the distinction referred to by Justice Burger has constitional roots. First, in United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), this Court emphatically rejected the notion that the Fifth Amendment's privilege against self-incrimination runs coterminously with the Sixth Amendment. There, this Court held that no Fifth Amendment violation occurs when an accused is indicted

and then placed in an identification line-up. But this Court made clear that this did not dispose of the Sixth Amendment concerns which arise where a person is subjected to a post-indictment line-up without counsel present. The Sixth Amendment's right to counsel guarantee, this Court recognized, focuses on the adversary nature of the criminal justice system. Viewed in this light, the Sixth Amendment guarantee "encompasses counsel's assistance whenever necessary to assure a meaningful 'defense.'" United States v. Wade, supra, 388 U.S. at 225.

This Court unambiguously rejected the view that the Sixth Amendment right to counsel is linked solely to protection of Fifth Amendment rights. The Sixth Amendment is rooted in the broader and more fundamental

> principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the

> prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment....

Id. at 226-27.

The second line of cases has its genesis in Massiah v. United States, 377 U.S. 201 (1964). There, this Court warned that

> Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal cases and the fundamental rights of persons charged with crimes.

Id. at 205.

The concern for fairness in the criminal justice process which animates the Wade and Massiah line of cases was ignored by the courts below. Calling an indicted defendant

before the grand jury is paradigmatically "a case where a defendant [is] in danger of being tricked by a lawyer's artfully contrived questions into giving his case away." United States v. Massiah, 307 F.2d 62, 66 (2d Cir. 1962), rev'd on other grounds, 377 U.S. 201 (1964).

Justice Brennan was right:

> the government may not in the absence of an intentional and knowing waiver call an indicted defendant before a grand jury and there interrogate him concerning the subject matter of a crime for which he already stands formally charged. Lawn v. United States, 355 U.S. 339 (1958).

United States v. Mandujano, supra, 425 U.S. at 594 (Brennan, J., concurring).

The Court of Appeals found Massiah's ban on secret interrogations inapplicable because, unlike Massiah, Petitioner has been granted use immunity. According to the Court of Appeals, "Kastigar completely answers

[Petitioner's] constitutional objections." (A-12) Contrary to the Court of Appeals' belief, Kastigar does not address, let alone "answer," the Sixth Amendment objection. The Court of Appeals embraced Kastigar as the panacea to all constitutional objections because it apparently viewed the Fifth Amendment as coterminous with the Sixth Amendment. As Chief Justice Burger suggested in Mandujano, and as this Court has long recognized, Petitioner's status as an indicted person triggers Sixth Amendment protections which extend beyond the Fifth Amendment's privilege against self-incrimination. See also Michigan v. Jackson, 475 U.S. 629 (1986) (an accused's Sixth Amendment right to counsel applies even where the Fifth Amendment is not implicated).

The Court of Appeals paid lip service to these principles but held that, given the grant of immunity, the Sixth Amendment guaranteed Petitioner nothing more than the right to have counsel outside the grand jury room with whom he might consult. The ruling effectively nullifies the Sixth Amendment in the grand jury context. Significantly, it does so upon a misconceived view of the Sixth Amendment's relationship to the Fifth Amendment privilege against self-incrimination.

Kastigar does not fully answer Petitioner's Sixth Amendment concerns. The immunity conferred under 18 U.S.C. §6002 is as broad as, but no broader than, the privilege against self-incrimination. United States v. Apfelbaum, 445 U.S. 115, 122 (1980). It is not at all clear, for example, especially in the Second Circuit, that the immunity order would

preclude non-evidentiary use of the compelled testimony by the prosecutor in the course of framing or arguing the appeal. See United States v. Mariani, 851 F.2d 595 (2d Cir. 1988); United States v. Crowson, 828 F.2d 1427 (9th Cir. 1987); United States v. Boyd, 765 F.2d 1524 (11th Cir. 1985). But see United States v. Semkiw, 712 F.2d 891 (3d Cir. 1983).

Moreover, the immunity order does not address or purport to address the myriad ways independent of the prosecutor's use of the testimony in which the prosecutor's interrogation of the Petitioner may tie defense counsel's hands, both on the appeal or at a subsequent retrial. The government violates the right to effective assistance of counsel when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the

defense." Perry v. Leeke, __ U.S. __, 109 S.Ct. 594, 599 (1989). The interrogation the government seeks will inevitably do just that.

Defense counsel, for example, will be bound by the Petitioner's answers to questions which the grand jury and the prosecutor choose to put, questions which defense counsel may have deliberately refrained from asking. Put most starkly, if the prosecutor is permitted to ask Petitioner whether or not he is guilty, and if, in response, Petitioner inculpates himself, defense counsel will be ethically foreclosed from arguing his innocence on the appeal, or putting him on the witness stand at a future retrial.

As to the first concern, the government has argued that Petitioner's real guilt or innocence is irrelevant to the appeal and that all that matters for appellate purposes is what is already in the district court record.

The Court of Appeals did not take so narrow a view, and did not embrace the notion that a defendant's guilt or innocence is beside the point at the appellate level. It nonetheless rejected the argument, and did so, Petitioner claims, without good or adequate reasons, and without real appreciation of how interrogation of the Petitioner under oath before his conviction has become final will interfere with his lawyer's ability to vigorously and properly represent him on the appeal.

If there is a retrial -- and Petitioner submits that there is a substantial likelihood that his conviction will be reversed and a new trial ordered -- the interference with the defense will be even more palpable. Following Nix v. Whiteside, 475 U.S. 157 (1986), many highly ethical lawyers have made the decision not to ask a client whether he is guilty or innocent. Surely the government may not

require a defense lawyer to ask his client that question, because a truthful answer may increase the risk of conviction by precluding the defense lawyer from calling defense witnesses to the stand. Yet calling the indicted defendant in front of a grand jury has the same effect as compelling a defense lawyer to ask his client whether he is guilty. That is why the government was forced to concede at oral argument that it would be improper to ask an indicted defendant whether he is guilty before his trial, even if a "Chinese Wall" were created.

For good reasons, our system of justice does not permit the government to require a defendant to enter his plea of not guilty under oath and to subject him to a perjury prosecution if he is convicted of the underlying crime. Compelling an indicted defendant -- whose appeal and request for a

retrial are pending -- to answer the grand jury's questions about guilt or innocence under oath, is functionally indistinguishable from requiring him to plead not guilty under oath. That is inconsisent with our long-established system of permitting a defendant to plead not guilty without swearing that he is not guilty. The Court of Appeals' decision failed to address this important issue.

In addition to these concerns, in the event of a reversal of Petitioner's conviction and a retrial, the unfair tactical advantage the prosecutor will have gained through having questioned the defendant will be impossible to assess or to remedy. Theoretically, the Fifth Amendment self-incrimination problem might be resolved through a Kastigar hearing. The Sixth Amendment problem cannot. Therefore, the invasion of the Sixth Amendment right should be enjoined before it occurs.

The Sixth Amendment issue is by itself an important one. Moreover, as matters now stand, a conflict exists in the circuits. In United States v. Doss, 563 F.2d 265 (6th Cir. 1977) (en banc), the Sixth Circuit roundly condemned as an abuse of the grand jury process the practice of calling an indicted defendant before the grand jury to interrogate him about the facts underlying the charged offense. Indeed, in the Doss case, the entire grand jury proceeding was declared void, and the defendant's conviction for perjury based on false testimony he gave the grand jury was reversed. In Doss, to be sure, the defendant was unaware that he had already been charged in a sealed indictment when he was called before the grand jury, and the en banc court was concerned that the government had improperly sought his testimony as a discovery device on the underlying charge.

Nevertheless, the Court's holding and its reasoning are equally applicable here: "where a substantial purpose of calling an indicted defendant before the grand jury is to question him secretly and without counsel present ... the proceeding is an abuse of process which violates both the right to counsel provision of the Sixth Amendment and the due process clause of the Fifth Amendment." Id. at 276. Citing United States v. Lawn, 115 F.Supp. 674, 677 (S.D.N.Y. 1953), the Doss Court said:

> When a person under our system of law has been indicted for a crime, the government has no more right to call him before a grand jury and question him about that crime than it has to call an unwilling defendant to the stand during trial of the case.

563 F.2d at 275. It went on to note that:

> the dearth of precedent for our instant case is probably due to the fact that most prosecutors would readily perceive that the

> practice undertaken here was fundamentally repugnant to the American system of justice.

Id. at 278.

Just as the prosecutorial conduct at issue in Doss was condemned, so too should the conduct engaged in here.

No principled Sixth Amendment distinction exists which turns on whether the defendant is subpoenaed to testify before his trial, or after his trial but while his appeal is pending. Indeed, if the government's position is accepted, there is no Sixth Amendment bar to hauling a defendant before the grand jury during his trial, or between verdict and sentence. In each of these situations, the defendant and the prosecutor are in an adversarial relationship. In each, the defendant is constitutionally entitled to the help of a lawyer. In every one, the defendant is at risk of jeopardizing his case.

The Court of Appeals' decision not only sanctions, but encourages the indictment of a person followed on the heels with a subpoena to testify before the grand jury. It is hard to conceive of a situation where the government does not believe that an individual it has indicted could give valuable inculpatory information about another individual.[4] Indeed, where more than one defendant has been indicted, the prosecutor would surely covet the opportunity to put each one before the grand jury to testify about the involvement of the other co-defendant or co-defendants. Under the Court of Appeals

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[4]Any prosecutor would also relish the opportunity to have the defendant's testimony under oath prior to trial if only for the psychological advantage it gives him, to prevent him from testifying or discourage inconsistent testimony at trial, or to provide the vehicle for a subsequent perjury indictment in the event the defendant is acquitted or, if convicted, his sentence is not severe enough to satisfy the prosecutor. The implications of this procedure for the plea bargaining process are also enormous.

ruling, so long as such testimony is not used at trial against the testifying defendant, he has no reason to resist or to complain. But an extraordinary restructuring of the criminal justice system will have occurred. Given the "congeries of interrelated constitutional considerations" acknowledged by the Court of Appeals (A-5), this Court should consider whether such a restructuring of the system can truly co-exist with the Constitutional guarantees protected by the Fifth Amendment's due process clause and the Sixth Amendment's guarantee of the right to counsel. Cf. Rochin v. California, 342 U.S. 165 (1952).

**B. The Fifth Amendment's Right To Remain Silent And Privilege Against Self-Incrimination, And The Court's Supervisory Power**

Petitioner submits that, under the Fifth Amendment, as a criminal defendant, he has a right to remain silent which is broader than the privilege against self-incrimination. His

right to remain silent means just that. Whether or not his answers would incriminate him, he is guaranteed the dignity of remaining mute in the face of the government's charges.

Because the right to remain silent is broader than the privilege against self-incrimination, Kastigar and the prohibition of "use" of the coerced testimony does not answer Petitioner's concerns.[5]

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[5]As the Kastigar Court noted, "... a grant of immunity must afford protection commensurate with that afforded by the privilege [against self-incrimination]." 406 U.S. at 453; United States v. Tantalo, 680 F.2d 903, 908 (2d Cir. 1982); United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976). The government bears the heavy burden of proving that its evidence is derived from a legitimate source wholly independent of the compelled testimony. Kastigar v. United States, supra, 406 U.S. at 460. In the usual context, where the immunized testimony was brief or on a tangential subject, the Kastigar burden can be carried at a hearing at which the government shows the requisite independent source and/or that a "Chinese wall" was built around the use of the immunized testimony. See United States v. Anzalone, 555 F.2d 317 (2d Cir.), aff'd on rehearing, 560 F.2d 492 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978).

(footnote continued)

Moreover, if, as the Court below held, Kastigar does defeat Petitioner's Fifth Amendment, compulsory self-incrimination claim,[6] then this may be an appropriate case for reconsideration of Kastigar and its

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(footnote continued from previous page)

In cases where a convicted defendant is compelled to testify about the subject of his just-concluded trial the nature of the inquiry changes. Some courts have noted that the "use" question with respect to a retrial is not ripe until the appellate court reverses. See United States v. Kember, 648 F.2d 1354 (D.C. Cir. 1980) (per curiam). Others have said that the transcript of the first trial constitutes the independent source and thus, so long as the second trial follows the script of the first, Kastigar is satisfied. See United States v. Borello, 624 F.Supp. 150 (E.D.N.Y. 1985). See also In re Liddy, 506 F.2d 1293 (D.C. Cir. 1974); In re Grand Jury Subpoena, 543 F.Supp. 985 (S.D.N.Y. 1982). With all due respect, this approach is unrealistic.

Trials are not videotapes which are identical whenever they are replayed. People learn from experience. They disregard what was ineffective at the first trial and emphasize what they now believe was not highlighted sufficiently the first time. In the unique context where the trial lawyer for the government subsequently interrogates the

(footnote continued)

implications.

Stripping this case to its essentials, it is plain that the grand jury subpoena, if enforced, will obligate the defendant to make

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(footnote continued from previous page) defendant before a grand jury, in the absence of his adversary and without the protection of the court, and elicits the defendant's version of the facts, it is not reasonable to believe that on a retrial the government will not use immunized testimony "in any respect." United States v. Kastigar, supra, 406 U.S. 463; United States v. McDaniel, supra, 449 F.2d 832; United States v. Anzalone, supra, 555 F.2d 317.

[6]Petitioner maintains, and maintained below, that, under Second Circuit precedent, §§6002-03 is not co-extensive with his Fifth Amendment rights against self-incrimination, and thus could not defeat his Fifth Amendment claim. In United States v. Gallo, 859 F.2d 1078 (2d Cir. 1988), cert. denied, 109 S.Ct. 2428 (1989), the Second Circuit held, over a dissent, that a harmless error rule applies to the government's use of evidence derived from a defendant's prior immunized grand jury testimony. In other words, in the Second Circuit, notwithstanding the Fifth Amendment and 18 U.S.C. §6002, a defendant will not be heard to complain if his coerced immunized testimony is used against him to obtain a conviction, unless he can also show that the Constitutional error affected the outcome of the proceeding.

testimonial communications which are or may be incriminating,[7] a concern which is at the very core of the Fifth Amendment's guarantee.

Recently, in Doe v. United States, __ U.S. __, 108 S.Ct. 2341, 2348-49 (1989), this Court said:

> Historically, the privilege [against self-incrimination] was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber -- the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover

[7] To the extent this argument assumes that Petitioner would inculpate himself, it does so because it is one of two logical alternatives, and because it is the scenario which the prosecutor postulates as the very reason for the subpoena. The other logical alternative is that Petitioner would maintain his innocence, consistent with his plea of not guilty. This latter scenario hardly eliminates the problem he faces for, if he so testifies, based upon the guilty verdict already "establishing" his guilt, the prosecutor threatens to indict him for perjury.

uncharged offenses, without evidence from another source. See Andresen v. Maryland, 427 U.S. 463, 470-471, 96 S.Ct. 2737, 2743-2744, 49 L.Ed.2d 627 (1976); 8 Wigmore §2250; E. Griswold, The Fifth Amendment Today 2-3 (1955). The major thrust of the policies undergirding the privilege is to prevent such compulsion. The Self-Incrimination Clause reflects "'a judgment ... that the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused'" (emphasis added). Ullmann v. United States, 350 U.S. 422, 427, 76 S.Ct. 497, 501, 100 L.Ed. 511 (1956), quoting Maffie v. United States, 209 F.2d 225, 227 (CA1 1954).

The Court in Murphy v. Waterfront Comm'n, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964), explained that the privilege is founded on "'our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which

> dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' ...; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' ...; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent,'" Id., at 55, 84 S.Ct., at 1596-1957 (citations omitted).

Virtually all of these policies are undermined by permitting the government to compel an indicted defendant to testify before the grand jury under penalty of contempt, even if use of that testimony against him is prohibited.

Granted, it has been said that "the scope of the privilege does not coincide with the complex of values it helps to protect."

Schmerber v. California, 384 U.S. 757, 761 (1966); Grosso v. United States, 390 U.S. 62, 72-73 (1968) (Brennan, J., concurring). But where the questioned practice undermines so many of the policies underlying the privilege, and in addition so fundamentally alters the existing balance between the power of the government and the sovereignty of the individual, then perhaps the scope of the privilege must be redefined. At the very least, the Fifth Amendment question is an important and an interesting one which should be considered by this Court. Whether the prosecutor's conduct is proscribed by the Fifth Amendment itself, or should be declared inappropriate in the exercise of the Court's supervisory authority over the administration of criminal justice in the federal courts, see McNabb v. United States, 318 U.S. 332 (1943), are questions which are fundamental to the

behavior of all federal prosecutors and to the operation of the criminal justice system as a whole.

C. The Ethical Violation

This case presents another, non-Constitutional issue which deserves this Court's attention: whether the prosecutor's interrogation of the indicted defendant before the grand jury violates DR 7-104(A)(1) of the American Bar Association's Code of Professional Responsibility, reprinted in N.Y. Jud. Law. app. D.R. 7-104 (McKinney 1975).[8]

DR 7-104(A)(1) provides:

> During the course of his representation of a client a lawyer shall not:
>
> 1. Communicate or cause another to communicate on the subject of a representation with a party he knows to be represented by a lawyer in that matter unless he has

[8]The federal courts enforce professional responsibility standards pursuant to their general supervisory authority over members of the bar. In re Snyder, 472 U.S. 634, 645 n.6 (1985). In addition, the Eastern District of New York, where this action arose, has adopted the Code of Professional Responsibility through local Rule 2 of its General Rules. United States v. Hammad, 858 F.2d 834, 837 (2d Cir. 1988).

> the prior consent of the lawyer representing such other party or is authorized by law to do so.

The Court of Appeals held that the prosecutor's interrogation of Petitioner in the grand jury would not violate this rule because the prosecutor's actions are "clearly" authorized by law.[9] (A-15) Petitioner submits that the subpoena of an indicted defendant to testify before the grand jury, even where he has been granted immunity, is not authorized by law, over the defendant's objection, and that this question, apparently one of first impression, deserves this Court's consideration.

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[9]The Court cited only Fed. R. Crim. P. 6(d) (prohibiting presence of counsel, other than attorneys for the government, inside the grand jury room) and concluded that Petitioner was lawfully subpoenaed as part of a continuing criminal investigation. (A-15)

## CONCLUSION

For the above stated reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: November 10, 1989
New York, New York

# APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1116—August Term 1988

(Argued April 12, 1989 Decided August 1, 1989)

Docket No. 89-6048

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

—v.—

MARTIN SCHWIMMER,

*Defendant-Appellant.*

Before:

NEWMAN, CARDAMONE and WINTER

*Circuit Judges*

Appellant Martin J. Schwimmer appeals from a finding of contempt and a summary order of confinement entered on March 14, 1989 in the United States District Court for the Eastern District of New York (McLaughlin, J.) pursuant to 28 U.S.C. § 1826(a).

Affirmed.

ALAN M. DERSHOWITZ, Cambridge, Massachusetts (Nathan Z. Dershowitz, Victoria B. Eiger, Dershowitz & Eiger, P.C., New York, New York, of counsel), *for Defendant-Appellant*.

MATTHEW J. BRIEF, Special Attorney, Organized Crime Strike Force, Eastern District of New York, Brooklyn, New York (Bruce Maffeo, Special Attorney, Organized Crime Strike Force, Eastern District of New York, Andrew J. Maloney, United States Attorney, Eastern District of New York, Edward A. McDonald, Attorney-in-Charge, Organized Crime Strike Force, Eastern District of New York, Brooklyn, New York, of counsel), *for Plaintiff-Appellee*.

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CARDAMONE, *Circuit Judge*:

The principal issue on this appeal is whether a defendant who has been tried, convicted, and whose appeal is pending may be granted use immunity and then be compelled to testify before a grand jury on matters that were the subject of his conviction, even though his appeal may result in a retrial of those offenses about which he gave compelled testimony. We believe the testimony of such a defendant may be compelled. Hence, we affirm.

## I FACTS

Appellant Martin Schwimmer takes this expedited appeal from a March 14, 1989 order of confinement imposed pursuant to 28 U.S.C. § 1826(a) (1982) in the United States District Court for the Eastern District of New York (McLaughlin, J.). The order appealed from resulted from Schwimmer's refusal, after having been granted use immunity pursuant to the provisions of 18 U.S.C. § 6002 (1982), to testify before a grand jury.

On June 16, 1987 a grand jury sitting in the Eastern District of New York indicted Schwimmer for receiving illegal employee benefit plan payments, 18 U.S.C. § 1954 (1982), engaging in a racketeering conspiracy, 18 U.S.C. § 1962 (1982), and tax evasion, 26 U.S.C. § 7201 (1982). Appellant entered a plea of not guilty, elected not to testify at his jury trial, and was convicted of the charged offenses. The convictions derived from his management of $100 million of assets for the benefit plans of two New York unions—Local 810 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Local 38 of the Sheetmetal Workers International Association of the AFL-CIO—from which he skimmed $14 million in concealed commissions. In addition to the receipt of illegal payments from the funds, appellant was convicted under the RICO count of making millions of dollars in payoffs to various Local 810 officials.

Following his conviction, Schwimmer was sentenced on February 14, 1989 to 10 years imprisonment, fined $1.6 million, and ordered to forfeit $4.5 million. At the close of the sentencing proceedings, he was served with a subpoena that demanded his appearance before a grand jury investigating the criminal activities of the union officials to

whom Schwimmer had made illicit payments. The government has represented to us that the grand jury before which appellant's testimony is sought is not the same grand jury that indicted him, though the same Assistant United States Attorney who prosecuted him is handling the current grand jury matter.

On the adjourned return date of the subpoena, Schwimmer appeared and was served with a February 22, 1989 order of Chief Judge Platt of the Eastern District directing him to testify under grant of use immunity. The testimony sought to be elicited related primarily to the participation of various union officials in the kickback schemes that were the subject of appellant's conviction. Schwimmer's judgment of conviction is currently on appeal before this Court. *See United States v. Schwimmer*, No. 89-1106 (2d Cir. appeal docketed Mar. 9, 1989). Despite the grant of immunity, Schwimmer refused to testify. Instead, he invoked his rights under the Fifth and Sixth Amendments to the United States Constitution, and also asserted that it was ethically improper for the prosecutor to question him before the grand jury without his attorney being present.

A hearing regarding appellant's refusal to testify was scheduled for March 14, 1989 before Judge McLaughlin, who had presided over Schwimmer's trial. Prior to the hearing, appellant moved to quash the subpoena on constitutional grounds. The government, in turn, moved for a finding of contempt and for a summary order of confinement pursuant to 18 U.S.C. § 1826. After oral argument, Judge McLaughlin denied Schwimmer's constitutional claims, concluding that his Fifth Amendment right to be free from self-incrimination was fully protected by the terms of Chief Judge Platt's immunity order, and that the Sixth Amendment merely guaranteed appellant the right

to have his attorney present for consultation outside the grand jury room—a right of which he had availed himself. Further, with respect to the effect of the compelled testimony on Schwimmer's appeal, the district court ruled that there was no denial of the effective assistance of counsel because none of appellant's compelled testimony could be used by the government in any proceedings, including his appeal or subsequent retrial. Accordingly, it held appellant in contempt for his unjustified refusal to testify before the grand jury and entered the order of confinement. The district court also determined that an expedited appeal from its order would neither be frivolous nor taken for purposes of delay. It therefore granted bail pending our resolution of the issues raised by Schwimmer's appeal. *See* 28 U.S.C. § 1826(b) (1982).

## II DISCUSSION

Appellant raises three separate challenges to the order of confinement. He argues that questioning a convicted defendant before a grand jury about the events that are the subject of his conviction while his appeal is pending is an abuse of the grand jury process that violates (1) his Fifth Amendment right against self-incrimination, (2) his Sixth Amendment right to the effective assistance of counsel, and (3) the provisions of the Code of Professional Responsibility prohibiting lawyers from communicating directly with opposing parties known to be represented by counsel. In essence, Schwimmer asserts that granting him use immunity under 18 U.S.C. § 6002 will not cure the constitutional transgressions that will occur if he is required to testify. These arguments present a congeries of interrelated constitutional considerations For purposes of clarity, we address each contention in order.

### A. *Fifth Amendment*

The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V, cl. 3. Appellant's principal contention is that the grant of use immunity is insufficient to protect this right if he is compelled to testify while his appeal is pending. Speculating about the possibility of a retrial and about prospective non-evidentiary use by the government of his coerced, immunized testimony Schwimmer asserts that there is no means of preventing such improper use short of adopting a "prophylactic" rule that would bar compulsion of the testimony in the first instance.

We begin discussion by analyzing the purpose of immunity statutes. The Supreme Court has repeatedly noted that such statutes are "part of our constitutional fabric." *Ullmann v. United States*, 350 U.S. 422, 438 (1956) (quoted in *Kastigar v. United States*, 406 U.S. 441, 447 (1972)). As recognized in *Kastigar*, they seek to strike a balance between constitutional protections against compulsory self-incrimination and the government's power to enforce the criminal laws effectively by compelling testimony before grand juries. 406 U.S. at 446. The constitutionality of the use immunity statute—18 U.S.C. § 6002—here at issue, has been upheld by the Supreme Court, which stated that the grant of such immunity must afford the witness protection commensurate with that which would have resulted had he been permitted to invoke the Fifth Amendment privilege against self-incrimination. *Id.* at 452-53. Stated another way, the grant of immunity must leave the witness " 'in substantially the same position as if the witness had claimed his privilege' in the absence of a grant of immunity." *Id.* at 458-59 (quot-

ing *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964)).

This rule permits the compulsion of incriminating testimony, but bars any use—derivative or otherwise—of the testimony so obtained. Section 6002 provides a "sweeping proscription" of any direct or indirect use of the testimony, including its use as an investigatory lead, or as a means of focusing an investigation on the witness. *See Kastigar*, 406 U.S. at 460. Further, once the witness has testified under a grant of immunity, the government bears the burden of demonstrating that its proof in a subsequent proceeding was derived from a wholly-independent source, untainted by the immunized testimony. *See Murphy*, 378 U.S. at 79 n.18. A defendant raising a claim that the provisions of § 6002 have been violated "need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *Kastigar*, 406 U.S. at 461-62.

Hence, we hold that *Kastigar* and the cases that followed it refute appellant's Fifth Amendment claim. So long as the government proves that its evidence at any subsequent retrial is derived from sources independent of the immunized testimony, the grant of use immunity to obtain testimony from a convicted defendant whose appeal is pending does not violate the Fifth Amendment. Other circuits have reached the same conclusion. *See United States v. Kember*, 648 F.2d 1354, 1362-63 (D.C. Cir. 1980) (per curiam); *United States v. Pantone*, 634 F.2d 716, 719 (3d Cir. 1980); *In re Liddy*, 506 F.2d 1293, 1301 (D.C. Cir. 1974) (en banc); *United States v. Kelly*, 464 F.2d 709, 712-13 (5th Cir. 1972); *see also United States v. Wilson*, 488

F.2d 1231, 1233 (2d Cir. 1973) (holding that use immunity is a sufficient answer to the Fifth Amendment claim of a defendant who has pled guilty, but has not yet been sentenced), *rev'd on other grounds*, 421 U.S. 309 (1975).

In fact, any retrial would itself provide a unique gauge by which the government's compliance with the dictates of *Kastigar* could be measured. That is to say, in the event of reversal on appeal and defendant's retrial, the transcript of the evidence at the first trial would furnish a record against which to compare the government's proof at the second trial. Armed with that record, the trial court could readily determine whether the government had deviated from the proof offered during the first trial and could then require the government to carry its burden of proving that any evidence not presented at the first trial was derived from sources wholly independent of the immunized testimony. *See, e.g., Pantone*, 634 F.2d at 719. Thus, any subsequent claim by appellant that the government had made any use of his immunized testimony at a putative retrial would be subjected to the district court's evaluation of whether the government had met its burden of showing that the challenged proffer was derived from independent sources. *See United States v. Gallo*, 859 F.2d 1078, 1083 (2d Cir. 1988), *cert. denied*, 104 L. Ed.2d 986 (1989); *United States v. Mariani*, 851 F.2d 595, 601 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1654 (1989).

The primary case relied upon by appellant for the proposition that compulsion of his testimony is barred by the Fifth Amendment is *United States v. Doss*, 563 F.2d 265 (6th Cir. 1977) (*en banc*). *Doss* is readily distinguishable from the instant appeal. There a defendant who was the subject of two sealed indictments was called as a witness before a grand jury and questioned regarding the crimes

with which, unbeknownst to him, he had already been charged. In that case, the Sixth Circuit concluded that it was "clear . . . that the government deliberately and purposefully employed the grand jury in questioning an already indicted defendant about the crime for which he was soon to be tried." *Id.* at 271. It condemned the prosecutor's use of the grand jury process as a discovery device, ruling that such abuse violates a defendant's Sixth Amendment right to counsel and his Fifth Amendment right to due process. *Id.* at 276.

Here, we discern no such improper motive on the government's part. The purpose of calling appellant before the grand jury is to obtain information regarding the identity of unapprehended individuals allegedly involved with him in the conspiracy as recipients of the payoffs. Unlike *Doss*, we cannot conclude that the government's actions were taken for the impermissible purpose of gathering evidence against the appellant-witness. In short, appellant's challenge to the order on Fifth Amendment grounds fails because the grant of immunity removes the risk of incrimination and makes that Amendment inapplicable.

Before leaving the discussion of the Fifth Amendment, we add a final comment. Although, as noted, the record of the first trial supplies the necessary safeguard against which to compare any overt prosecutorial change in strategy undertaken at a second trial, concern remains that access to and knowledge of possibly self-incriminating grand jury testimony might affect a retrial in subtle ways, not immediately perceptible either to the district judge or to subsequent panels of this Court. In the case at bar, for example, the non-evidentiary use of the compelled testimony—so disquieting to appellant—is use that might assist the prosecutor in focusing additional investigation,

planning, cross-examination, or otherwise generally mapping a strategy for retrial. *See United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973). Even though the issue will not ripen unless and until Schwimmer's conviction is reversed and he is retried, we think that the government should consider taking steps to ensure that any subsequent proceedings are not tainted by individual prosecutorial access to the coerced testimony. Without deciding the issue, it would appear prudent for the government in the event of a retrial to establish a so-called "Chinese Wall" between its prosecutors exposed to the present grand jury testimony—the ordering of which is the subject of this appeal—and those prosecutors who may be assigned to retry defendant. *See United States v. Semkiw*, 712 F.2d 891, 895 (3d Cir. 1983) (adopting such approach); U.S. Dep't of Justice, United States Attorneys' Manual § 1-11.400, at 21 (1987) (to demonstrate that *no* non-evidentiary use has been made of the compelled testimony, prosecution should be handled by an attorney unfamiliar with its substance).

### B. *Sixth Amendment*

Appellant's next contention is that his testimony before the grand jury without counsel present while his appeal is pending violates his Sixth Amendment right to the effective assistance of counsel. This claim raises an issue of first impression in this Circuit. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. Because Schwimmer is the subject of ongoing adversarial proceedings—currently on appeal to this Court—there is no doubt that his right to the effective assistance of counsel has attached.

*See, e.g., United States v. Gouveia*, 467 U.S. 180, 188 (1984); *Kirby v. Illinois*, 406 U.S. 682, 688 (1972); *Powell v. Alabama*, 287 U.S. 45, 69-70 (1932). His right to the assistance of counsel continues during the pendency of his appeal. *See Evitts v. Lucey*, 469 U.S. 387, 404-05 (1985); *Anders v. California*, 386 U.S. 738, 744 (1967). Thus, appellant asserts that any questioning by the prosecutor outside the immediate physical presence of his counsel violates the Sixth Amendment. We cannot agree.

In *United States v. Mandujano*, 425 U.S. 564, 581 (1976), the Court observed that a grand jury witness who had a right to the assistance of counsel could not insist that his attorney accompany him into the grand jury room. Appellant claims that his conviction raises entirely different Sixth Amendment concerns unaddressed by *Mandujano* because no criminal proceedings had been instituted against Mandujano. Schwimmer then directs our attention to *Massiah v. United States*, 377 U.S. 201 (1964), where the Supreme Court stated that "[a]ny secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime." *Id.* at 205 (quoting *People v. Waterman*, 9 N.Y.2d 561, 565 (1961)). Relying on this language in *Massiah*, appellant contends that had criminal charges been brought against Mandujano, he would have been entitled to have counsel accompany him in the grand jury room. Thus, because he has already been indicted and convicted, and his appeal is pending, the argument goes, he too has an absolute right to his lawyer's presence when questioned.

Schwimmer's arguments overlook the fact that, unlike the defendant in *Massiah*, he has been granted use immunity under § 6002 in exchange for his testimony. Thus, the rationale of *Kastigar* completely answers appellant's constitutional objections: no valid constitutional objection lies so long as the government cannot use the compelled testimony against Schwimmer in any fashion. Accordingly, a defendant's right to counsel when a grand jury appearance is at issue extends only to the right to consult counsel outside the grand jury room. Here Schwimmer had the right to leave and did leave the grand jury room for consultations with his attorney. The protections inherent in a grant of use and derivative use immunity under § 6002 are sufficient to defeat appellant's constitutional challenges to the compulsion of his testimony in the grand jury room, outside the immediate physical presence of counsel. *Cf. United States v. Kember*, 648 F.2d 1354, 1363-64 (D.C. Cir. 1980) (per curiam) (rejecting argument that coerced immunized testimony intruded upon attorney-client relationship).

Appellant's additional arguments under the Sixth Amendment are without merit. First, contrary to Schwimmer's contention, the attorney-client relationship will not be impermissibly encroached upon by the compulsion of his testimony. Nothing that we decide can be read to proscribe Schwimmer's proper invocation of the attorney-client privilege. *See United States v. Calandra*, 414 U.S. 338, 346 (1974). In any event, the answers sought to be elicited concern matters that transpired prior to the initiation of an attorney-client relationship between appellant and his present counsel of record.

Second, Schwimmer contends that his answers in the grand jury may ethically foreclose his counsel from mak-

ing arguments concerning his innocence on appeal. We recognize that it is a powerful argument for counsel to stand before an appellate tribunal and represent that his client is innocent. The common law has historically been imbued with the belief that "it is better that ten guilty persons escape, than that one innocent suffer." 4 W. Blackstone, *Commentaries on the Laws of England*, ch. 27 (1769), which capsulizes a similar notion Voltaire expressed two decades earlier. Yet, at the same time it is essential to the just administration of the criminal law that the guilty be swiftly and certainly subject to punishment. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452 (1963). We understand counsel's argument to mean that his client is innocent of the crimes charged, in other words, not guilty beyond a reasonable doubt of those crimes in light of the evidence that was properly or should properly have been before the jury. His opportunity to argue that his client is not guilty is not diminished by Schwimmer being compelled to testify. Counsel's point amounts to nothing more than that—like an ostrich hiding its head in the sand—if counsel does not hear or know of his client's guilt, he can proclaim his innocence. Even if appellant's truthful answers before the grand jury establish his guilt, and even assuming counsel thereafter learns of those answers, Schwimmer's appellate attorney certainly is not foreclosed from raising arguments concerning the sufficiency of the government's proof at trial that established appellant's guilt. In fact, counsel would be ethically *obligated* to raise such arguments regardless of his knowledge or lack of knowledge of his client's innocence.

In sum, the use and derivative use immunity afforded Schwimmer pursuant to § 6002 adequately protects against any infringement of his Sixth Amendment rights.

His testimony has not been sought as an impermissible discovery device as was the case in *Doss*, his attorney will be available for consultation at all times outside the grand jury room, and he can invoke the attorney-client privilege whenever necessary and appropriate. Thus, the compulsion of Schwimmer's testimony before the grand jury under a grant of immunity does not infringe his Sixth Amendment right to the effective assistance of counsel.

### C. *Code of Professional Responsibility*

Appellant's final contention is that the prosecutor may not question him before the grand jury without violating Disciplinary Rule 7-104(A)(1) of the American Bar Association's Code of Professional Responsibility, *reprinted in* N.Y. Jud. Law app. Dr 7-104 (McKinney 1975) that provides:

> A. During the course of his representation of a client a lawyer shall not:
>
> 1. Communicate or cause another to communicate on the subject of a representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Schwimmer argues that DR 7-104(A)(1) proscribes a prosecutor from questioning before a grand jury a convicted defendant known to be represented by counsel.

This argument fails because Schwimmer's grand jury appearance and questioning fall within the "authorized by law" language of Rule 7-104(A)(1). That is, even though the questioning is without opposing counsel's consent, the

prosecutor's actions are clearly "authorized by law" within the contemplation of the language of DR 7-104(A)(1). *Cf.* Fed. R. Crim. P. 6(d) (prohibiting presence of counsel, other than attorneys for the government, inside the grand jury room). As part of a continuing criminal investigation appellant has been lawfully subpoenaed to testify before the grand jury in order to "illuminate the shadowy precincts of corruption and crime." *United States v. Mandujano*, 425 U.S. at 573. He is not the target of that investigation, his testimony is immunized pursuant to § 6002, and he may consult with counsel any time outside the grand jury room. Accordingly, the prosecutor's direct questioning of Schwimmer before the grand jury outside the presence of his counsel is authorized by law and therefore does not violate the Code of Professional Responsibility.

Our recent decision in *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988), is not to the contrary. In *Hammad*, a prosecutor provided an informant with a sham subpoena and arranged for the taping of the informant's conversation with the defendant, even though the prosecutor knew the defendant was represented by counsel. *Id.* at 836. When the defendant was subsequently indicted, partly as a result of the recordings made by the informant, we held that the prosecutor had committed an ethical violation, but limited the holding to the circumstances of that case. We declined to adopt a bright line rule delineating when actions would violate DR 7-104(A)(1) and left the question of what constitutes a violation of the ethical standards to be determined on a case-by-case basis. *Id.*

Unlike *Hammad*, we discern here no improper purpose on the prosecutor's part in his subpoenaing Schwimmer to testify. Consequently, because the prosecutor's question-

ing of Schwimmer before the grand jury is "authorized by law," it does not transgress DR 7-104(A)(1).

## III CONCLUSION

For the reasons above stated, the order holding defendant in civil contempt and directing his confinement until such time as he testifies before the grand jury is affirmed.



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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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EDNY 89 cv 0831 McLaughlin

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the First day of August, one thousand nine hundred and eighty-nine.

Present:
HON. JON O. NEWMAN,
HON. RICHARD J. CARDAMONE,
HON. RALPH K. WINTER
Circuit Judges,

| | |
|---|---|
| UNITED STATES OF AMERICA, | DOCKET NUMBER 89-6048 |
| Plaintiff-Appellee, | |
| -v- | UNITED STATES COURT OF APPEALS |
| MARTIN SCHWIMMER, | FILED |
| | AUG -1 1989 |
| Defendant-Appellant. | ELAINE B. GOLDSMITH, CLERK |
| | SECOND CIRCUIT |

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

Elaine B. Goldsmith,
Clerk

/s/
By: Edward J. Guardaro,
Deputy Clerk

ISSUED AS MANDATE: Nov. 2, 1989

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 14th day of September, one thousand nine hundred and eighty-nine.

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| UNITED STATES OF AMERICA, | DOCKET NUMBER 89-6048 |
| Plaintiff-Appellee, | |
| -v- | UNITED STATES COURT OF APPEALS FILED SEP 14 1989 ELAINE B. GOLDSMITH, CLERK SECOND CIRCUIT |
| MARTIN SCHWIMMER, | |
| Defendant-Appellant. | |

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellant, Martin Schwimmer,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

ORAL RULING RENDERED MARCH 14, 1989 BY THE HONORABLE JOSEPH M. McLAUGHLIN, U.S.D.J.

THE COURT: If you will take your seats. This is a motion by the government to hold the defendant Martin Schwimmer in civil contempt. The posture of the record is this. The defendant was tried before this Court and was convicted and sentenced, and on the date of the sentence was served with a subpoena to appear before a different grand jury from the one that indicted him, but a grand jury that was basically looking into the same matters that lead to the first Schwimmer indictment.

The defendant invoking his Fifth and Sixth Amendment privileges refused to testify before that grand jury. An order was signed by Chief Judge Platt on February 22 of this year giving the defendant use immunity for any testimony he would give before this second grand jury.

The defendant has steadfastly refused to testify, arguing that both his Fifth and Sixth Amendment rights are infringed by this government tactic.

As to his Fifth Amendment rights the defendant has been given complete use immunity in the Judge Platt order. Any testimony he gives before this second grand jury cannot be used against him in any way nor can it be used as the fountain head of leads to develop other evidence against him.

The Sixth Amendment rights raised by the defendant are a little more elusive to pin down. It is clear that the defendant does not have the right to counsel before the grand jury. What he has is a right to have counsel outside the grand jury room with whom he can confer when necessary. That right has been and will continue to be accorded to the defendant.

Thus, his right to counsel vis-a-vis the second grand jury has not been infringed. It there is any infringement on the defendant's right to counsel it has to be with respect to the Schwimmer conviction. That case is presently wending its way through the Circuit Court of Appeals.

Counsel has made an argument that the second grand jury would in some fashion chill his advocacy in that appeal.

I find the argument unpersuasive. The rock bottom fact remains that nothing said before the second grand jury can be used in any fashion against the defendant and that would include on appeal.

The Court is, therefore, satisfied that the defendant's right to counsel has been observed in all respects.

The Court, therefore, agrees with Judge Platt that the defendant must appear before the grand jury and must answer the questions put to him by the government.

* * *

The Court, therefore, finds that the defendant Schwimmer is in contempt and under 1826A. The Court summarily orders his confinement to the custody of the Attorney until he gives testimony before the grand jury as ordered by the Court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X
UNITED STATES OF AMERICA,:

Plaintiff, :

-against- :

MARTIN SCHWIMMER, :

Defendant. :
----------X

CR 87-423 (JMM)

ORDER

THIS matter having come before the Court on the application of defendant Martin Schwimmer, pursuant to Fed. R. Crim. Pro. 17(c), for an order quashing a grand jury subpoena dated February 14, 1989, and on the application of the United States, pursuant to 28 U.S.C. §1826(a), for an order of confinement in accordance with the civil contempt provisions of 28 U.S.C. §1826,

For the reasons set forth in the Court's oral ruling this date, pursuant to 28 U.S.C. §1826, this Court finds the defendant Martin

Schwimmer in contempt, and summarily orders that he be confined until such time as he is willing to give testimony.

It is further ordered, pursuant to 28 U.S.C. §1826(b), that defendant Martin Schwimmer be admitted to bail pending the determination of the appeal from the order of confinement, this Court having found that the appeal is neither frivolous nor taken for delay.

/s/
Joseph M. McLaughlin
United States
District Judge

Dated: March 14, 1989